FLOW
FOR LOVE OF WATER

Protecting the Common Waters of the Great Lakes Basin
Through Public Trust Solutions

January 15, 2021

Via E-filing

Ms. Lisa Felice
Michigan Public Service Commission
7109 W. Saginaw Hwy.
P. O. Box 30221
Lansing, MI 48909

RE: MPSC Case No. U-20763

Dear Ms. Felice:

The following is attached for paperless electronic filing:

Initial Brief of Intervenor For Love of Water (FLOW) on Remand Regarding the Motion in Limine by Enbridge Energy, Limited Partnership

Proof of Service

Sincerely,

James Olson
jim@flowforwater.org

xc: Parties to Case No. U-20763

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the Application of Enbridge Energy, Limited Partnership for the Authority to Replace and Relocate the Segment of Line 5 Crossing the Straits of Mackinac into a Tunnel Beneath the Straits of Mackinac, if Approval is Required Pursuant to 1929 PA 16; MCL 483.1 et seq. and Rule 447 of the Michigan Public Service Commission's Rules of Practice and Procedure, R 792.10447, or the Grant of other Appropriate Relief	U-20763 ALJ Dennis Mack

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INITIAL BRIEF OF INTERVENOR FOR LOVE OF WATER (FLOW)

ON REMAND REGARDING THE MOTION IN LIMINE

BY ENBRIDGE ENERGY, LIMITED PARTNERSHIP

January 15, 2021

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I. INTRODUCTION

One of the irrefutable legal facts in this proceeding is that the State of Michigan obtained title to the bottomlands and waters of the Great Lakes in public trust on admission to statehood. Under public trust law, the State has a solemn duty to protect the public trust, and cannot alienate, convey, lease, or dispose of all or any part of these public trust lands and waters without a law that delegates express authority to an agency to make the mandatory findings of the improvement of public trust and no impairment of the public trust. Under the State's sovereign title and the public trust doctrine, any conveyance, easement, lease or other occupancy agreement of the trust land and waters that is entered into without these findings is void and/or has no legal effect.

The Commission has remanded the legal question of the scope of evidence to be reviewed and considered in making its decision under Act 16 in these proceedings to consider the legal effect on this scope of review of the State's Notification of Revocation of the 1953 easement for the existing dual pipelines in the Straits. The Commission's remand points to four significant conclusions that are addressed in the brief that follows, but summarized here at the outset.

First, the irrefutable fact that Enbridge's proposed Tunnel Project involves the location, use, and siting of the Project on, in, or under public trust bottomlands defines the lens, that is the breadth and degree of scrutiny by the Commission informed by the paramount rights and duties of the State and its citizens as legal beneficiaries under the public trust doctrine. The State and its agencies, including the Michigan Public Service Commission ("MPSC") are the "sworn

guardians" of the public trust in the bottomlands and waters of the Great Lakes, and have an affirmative duty to protect and assure that their decisions comply with these strict requirements.[1]

> This Court, equally with the legislative and executive departments, is one of the sworn guardians of Michigan's duty and responsibility as trustee of the above delineated beds of five Great Lakes. Long ago we committed ourselves (citations omitted) to the universally accepted rules of such trusteeship as announced by the Supreme Court in *Illinois Central Railroad Co. v. State of Illinois*, 146 U.S. 387, 13 S.Ct. 110, 119, 36 L.Ed. 1018. … [I]t will be found authoritatively that no part of the beds of the Great Lakes, belonging to Michigan and not coming within the purview of previous legislation such as the swamp land acts and the St. Clair Flats leasing acts (see *State v. Lake St. Clair Fishing & Shooting Club* and *Nedtweg v. Wallace*, supra), can be alienated or otherwise devoted to private use in the absence of due finding of one of two exceptional ***413** reasons for such alienation or devotion to non-public use. One exception exists where the State has, in due recorded form, determined that a given parcel of such submerged land may and should be conveyed 'in the improvement of the interest thus held' (referring to the public trust). The other is present where the State has, in similar form, determined that such disposition may be made 'without detriment to the public interest in the lands and waters remaining.'[2]

The Commission, as an agency of the State, must ensure that its decisions conform to requirements of public trust law. This is particularly important in the present matter, because of the scope of the Commission's obligation to determine whether the tunnel and tunnel pipeline is based on the public interest, necessary, and siting or locating the project in or under public trust bottomlands of the Great Lakes. As a matter of legal fact and law in this proceeding, the Straits of Mackinac, its bottomlands, the public trust requires the Commission, in its role as trustee of these lands and waters, to prevent improper use and subordination or impairment of these lands and waters for the paramount public rights of navigation, fishing, boating, sustenance, drinking water, swimming, and other forms or recreation that are the bedrock of Michigan's quality of life and economy.

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[1] *Obrecht v National Gypsum Co.*, 361 Mich 299 (1960).

[2] *Id*. 361 Mich at 412-413.

Second, there would be no Line 5 in the public trust bottomlands and waters of the Straits of Mackinac if in 1952, if the State had not enacted 1952 PA 10, delegating to the Department of Conservation the authority to grant easements for public utility pipelines in, on, or under the trust bottomlands of the Great Lakes. In other words, the entire 645-mile Line 5 from Superior to Wisconsin to Port Huron and into Sarnia, Canada would not exist; Enbridge's predecessor Lakehead would have chosen the other alternative it was considering—route the Line around Chicago and across southern Michigan to Sarnia. Ironically, that is what Lakehead did anyway, when this Commission in 1969 authorized it to locate, construct and operate Line 6b, now replaced by Line 78 after the rupture of Line 6b and the Kalamazoo River disaster. The point is that any decisions involving the public trust lands and waters of the State and its citizens was and remains necessarily inseparable from all of Line 5. In other words, an agency of the State cannot fulfill its sworn duty under the public trust doctrine without considering the evidence regarding all aspects of the public trust and paramount public uses connected with all of Line 5.

In this matter, when the Department of Conservation granted the easement to locate Line 5 in the Straits, it did not make either of the above-required findings under public trust law, and to this day no such findings have been made.[3] As a result, in December 2020, after carefully reviewing the 1953 easement and dangers associated with Enbridge's continued use of the 67-year-old dual pipelines, the Department of Natural Resources ("DNR") exercised its authority and fulfilled its duty under public trust law embedded in the easement. The DNR served Notification of Revocation on Enbridge, revoking the 1953 easement because it is void without

[3] *Illinois Central R Rd v Illinois*, 146 U.S. 387 (1892); *Id*., *Obrecht v National Gypsum Co*. Like all of the states, when Michigan joined the United States in 1837, the State of Michigan took title, absolutely, as sovereign for its citizens under the "equal footing" doctrine to all of the navigable waters in its territory, including the Great Lakes, and "*all of the soils under them*" below the natural ordinary high mark.

the mandatory findings and because of the clear and uncontrollable events and risks of catastrophic harm to the public trust. Based on United States Supreme Court and Michigan Supreme Court public trust law in existence for more than 100 years, a conveyance or agreement to use of Great Lakes bottomlands is subject to and limited by this perpetual trust; this includes the irrepealable right of to nullify or revoke an easement and its use when it is determined that such easement and use are no longer in compliance with the standards under public trust law.

Third, similar to the revocation of the 1953 easement, Enbridge's Application for approval of the Tunnel Project under Act 16 depends entirely on the validity and legal effect of the 2018 DNR Easement, Assignment of Easement, and Tunnel Agreements that bind the State and citizens to a commitment to the Tunnel Project and necessarily the entirety of Line 5 for the length of the commitment, which is 99 years. In fact and law, these claimed property interests in the State's public trust bottomlands and waters of the Straits were not, and have not, been authorized by the above-descried mandatory findings required by public trust law for the DNR's 2018 public utility easement and its assignment to Enbridge. Moreover, the 2018 easement, the assignment, and 99-year lease provision have not been authorized under and required by the Great Lakes Submerged Lands Act ("GLSLA"),[4] and are, therefore, void and/or have no legal effect; as a result, Enbridge cannot proceed under Act 16 unless and until it has obtained authorization for these claimed rights to use public trust lands and waters in the Straits as required by the common law public trust doctrine and/or the GLSLA.

Fourth, Enbridge's attempt to narrow the scope of review and decision is contrary to the required scope of review under Act 16 and the Michigan Environmental Protection Act

[4] 1955 PA 59, 1957 PA 247, 1958 PA 94, as amended; MCL 324.32501 et seq; specifically, Sections 32502-32508.

("MEPA"), because without the 1953 easement, the Commission will be required to consider and determine under Act 16 whether the State and its citizens can factually and legally commit to the Tunnel Project and its 99-year term, a term that extends far beyond the life of the existing dual lines, whether the 1953 easement is void or revoked, because the Commission and State never authorized, and could not authorize, the 67-year old pipelines for 99 years plus 67 or 166 years! And, the Commission and State now must consider the reality that Line 5 in its entirety for another 99 years are needed, safe and in the public interest, and a reasonable alternative compared to other routes or adjustments that do not require a new line or route, but that are no longer necessary.

Fifth, the Notification of Revocation of the 1953 easement does not affect the comprehensive scope of evidence legally necessary for the Commission to review and determine the Enbridge application under the mandatory application of the scope of review and consideration of necessity, the public interest and effects, and feasible and prudent alternatives under the MEPA and the binding legal precedent under its common law of the environmental quality.[5]

II. ENBRIDGE CANNOT PROCEED UNDER ACT 16 UNLESS AND UNTIL THE DECEMBER 2018 EASEMENT AND TUNNEL LEASE AND ASSIGNMENT HAVE BEEN AUTHORIZED UNDER THE PTD AND GLSLA.

The Commission's Remand Order highlights an issue that is determinative in this case: Enbridge does not have a legally cognizable property interest in the 2018 DNR easement assigned to it by the Mackinac Straits Corridor Authority and the Tunnel Agreement's 99-year lease of the tunnel for the proposed new pipeline. Without Enbridge having valid interest to use the public trust bottomlands, the Commission should dismiss the proceeding.

[5] MCL 324.1701 et seq,

The basis of the November 13, 2020 *Notice of Revocation and Termination of Easement* ("NRTE") issued by Governor Whitmer and Department of Natural Resources Director Dan Eichinger was two-fold. First, the NRTE found that when the State of Michigan conveyed the 1953 easement to Enbridge's processor in interest, the state never made the specific findings, required under the Public Trust Doctrine ("PTD"), that the Easement would either (1) improve navigation or another public trust interest; or (2) could be conveyed without impairment of the public trust. In the absence of such a finding or determination the 1953 easement was null and void. The second basis of the NRTE was the violation and breach of the terms and conditions of the 1953 easement.

The first legal basis of the NRTE is also dispositive of this proceeding. Enbridge does not have a legally cognizable property interest in the state bottomlands through which the proposed tunnel would be excavated. The December 2018 easement as well as the 99-year lease from the Mackinac Straits Corridor Authority ("MSCA") to Enbridge suffer from the same fatal flaw as the 1953 Easement; that is, the record and the attached easement, assignment, and lease demonstrate that none of the requisite findings required under the PTD and the 1955 GLSLA, as amended, were ever made.[6] Therefore, Enbridge and the State are on notice of the fact that the

[6] On November 8, 2018, FLOW submitted a letter to the Mackinac Bridge Authority, former Governor Rick Snyder, former DEQ Director Heidi Grether, former DNR Director Keith Creagh, and former Attorney General Bill Schuette of the critically necessary legal requirements for proper authorization and approval of a tunnel corridor and tunnel pipeline in the soils and bottomland under the common law public trust, the GLSLA, MCL 3234.32502-32508 that govern the use, occupancy, control, and operation of a private corridor tunnel, pipeline, and operation by a private corporation in the public trust waters and soils beneath the Great Lakes. https://forloveofwater.org/wp-content/uploads/2020/04/FLOW-MBA-Authority-Letter-11-01-18.pdf On December 18, 2018, FLOW submitted a subsequent letter to the Governor and the same State officials, more fully addressing the violations of rule of law by the State and its officials of the GLSLA and public trust law. https://forloveofwater.org/wp-content/uploads/2020/04/FLOW-Public-Comment-12-18-18.pdf
On March 5, 2020, FLOW submitted a letter setting forth a similar basis under the GLSLA and public trust law in Michigan to the Mackinac Straits Corridor Authority ("MSCA") as part of a meeting to consider Enbridge's announced plans to apply for the required authorizations, approvals, and permits for a tunnel and tunnel pipeline. These letters are incorporated by reference. On May 1, 2020, FLOW and the Straits of Mackinac Alliance (SMA) submitted a letter to the Department of Environment, Great Lakes, and Energy (EGLE), rearticulating the argument that Enbridge must apply and obtain legal authorization under the GLSLA, PTD, and equal foot doctrine prior to

easement, assignment, and 99-year lease have not been authorized under public trust law and the GLSLA, and are void or have not legal effect until the matters have been properly determined as required by law.[7]

On December 17, 2018, the DNR conveyed an *Easement to Construct and Maintain Underground Utility Tunnel* ("2018 Easement") at the Straits of Mackinac to the Mackinac Straits Corridor Authority pursuant to MCL 324.2129, which authorizes the DNR to "grant easements, upon terms and conditions the department determines just and reasonable, for.…operating pipelines…" Two days later on December 19, 2018 the MSCA, acting under authority of MCL 254.324a(1) and MCL 254.324d(1), executed an *Assignment of Easement Rights for Utility Tunnel* ("2018 Assignment"), conveying state lands subjacent to the bottomlands to Enbridge. At the same time, the Tunnel Agreement between the State and Enbridge provides for and attaches a 99-year lease from the MSCA to Enbridge for locating, occupying and operating the new Line 5 30-inch pipeline in the tunnel. Like the DNR 2018 Easement to the MSCA and the 99-year lease, the Assignment of the 2018 Easement to Enbridge violated the public trust doctrine from its inception because like the 1953 Easement that is the subject of the Governor's NRTE, the State never made the required determinations under the PTD and the GLSLA.

Public Act 10, Public Acts 1952, MCL 324.2129, specifically delegated authority to the DNR to convey public utility easements over public lands and the trust bottomlands of the State, the DNR did not make any findings or determinations that the conveyance would (1) improve,

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seeking permission to build a corridor tunnel for its pipeline. https://forloveofwater.org/wp-content/uploads/2020/06/FLOW-and-Straits-of-Mackinac-Alliances-formal-legal-comments-to-EGLE.pdf

[7] Intervenor FLOW submitted its First Interrogatories to Applicant Enbridge, dated September 14, 2020, for the Applicant to answer whether it had requested findings and authorization under the public trust doctrine and the GLSLA. In its Answer, Enbridge refused to answer the questions, claiming they were not relevant. The factual and legal authorization of the easement, lease, and use interest to site the tunnel and tunnel pipeline under Act 16 could not be more relevant.

enhance, or (2) not adversely affect public rights and public trust in the waters and bottomlands of the Straits of Mackinac.[8] Indeed, paragraph (13) of the 2018 Easement conveyed by the DNR contains an explicit disclaimer that no such findings or authorizations were made in conjunction with the conveyance.

> (13) "It is expressly understood and agreed that nothing in this easement shall be construed as a statement, representation or finding by the Grantor relating to any risks that may be posed to the environment by activities conducted by the Grantee or that the right-of-way conveyed by this easement is fit for any particular use or purpose."

The purpose of the mandatory findings that the State's public trust interest would be improved, enhanced, or not impaired by a conveyance of state lands is to protect the State's public trust interests from the risks that an activity may pose to the environment. The explicit disavowal of such a finding makes clear that no such finding or determination was ever made.

The subsequent assignment of the 2018 Easement must also fail because the Easement itself is invalid and void. Nevertheless, the 2018 Assignment also makes clear that it too was subject to the express condition that the assignment be compliant with "all *applicable laws and regulations and any permits or governmental approvals required under those laws and regulations."*[9]

As noted above, similarly, the 99-year lease provision in the 2018 Tunnel Agreement and attached 99-year lease of the tunnel for the pipeline were also not authorized and not based on the

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[8] *Illinois Central R Rd v Illinois*, 146 US at 455-456; *Obrecht v National Gypsum Co*., 361 Mich at 414-416 (1960), n. 1, *supra*; discussed in detail at n. 14-17, *infra*, and accompanying text.

[9] Terms and Conditions: This Assignment is subject to the following terms and conditions:
1. Assignee's use of the Easement Premises is subject to and conditioned upon its compliance with the terms of (subject to any notice and cure periods provided therein):
(a) The Tunnel Agreement (unless and until terminated in accordance with Sections 17.3(a)(i),
(b), (c) or (d) thereof.
(b) The Easement.
(c) All applicable laws and regulations and any permits or governmental approvals required under those laws and regulations.

findings required by the public trust doctrine and the GLSLA. Nor do any of the "Agreements"[10] including the lease, executed by the outgoing administration or MSCA at the close of 2018 provide any findings or determinations that the conveyance of the 2018 Easement would improve, enhance, or not adversely affect public rights in the uses protected by the Public Trust Doctrine.

Notably, the 2018 amendments to the Mackinac Bridge Authority Act contains an explicit provision also making clear that Enbridge must obtain all the "required permits and approvals" and "location" for the proposed tunnel. [11]

> (g) That the proposed tunnel agreement does not exempt any entity that constructs or uses the utility tunnel from the obligation to obtain any required governmental permits or approvals for the construction or use of the utility tunnel. MCL 254.324d(4)(g).[12]

While the 2018 amendments do contain generalized statements of "public purposes,"[13] these conclusory statements are far from meeting the requisite findings and determinations that

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[10] The "Agreements" 'executed to advance the tunnel project in the closing day of 2018 are:

- Second Agreement Between the State of Michigan, Michigan Department of Environmental Quality, and Michigan Department of Natural Resources and Enbridge Energy, Limited Partnership, Enbridge Energy Company, Inc., and Enbridge Energy Partners, L.P. (executed October 2,3 2018) https://www.michigan.gov/documents/line5/Enbridge_Second_Agreement_with_Governor_Snyder_October_2018_695450_7.pdf
- Third Agreement Between the State Of Michigan, Michigan Department of Environmental Quality, and Michigan Department of Natural Resources and Enbridge Energy, Limited Partnership, Enbridge Energy Company, Inc., and Enbridge Energy Partners, L.P. (executed December 17-19, 2018) https://www.michigan.gov/documents/mdot/ThirdAgreementMichiganEnbridge_684307_7.pdf
- Tunnel Agreement between the Mackinac Straits Corridor Authority and Enbridge Energy, Limited Partnership (executed December 19, 2018) https://www.michigan.gov/documents/mdot/Tunnel_Agreement-MCSA_Enbridge_Energy_684294_7.PDF
- The first agreement executed was the Agreement Between the State of Michigan and Enbridge Energy, Limited Partnership and Enbridge Energy Company, Inc. (executed November 27, 2017) https://www.michigan.gov/documents/snyder/Enbridge_Agreement_11-27-17_606863_7.pdf

[11] 359 PA 2018.

[12] See also Sec. 14(a)(4) 359 PA 2018 (This section authorizes and requires the MSCA to " to secure the approval of any department, agency, instrumentality, or officer of the United States government *or this state required by law to approve the plans, specifications, and location of the utility tunnel* or the fees to be charged *for the use of the utility tunnel*").

[13] MCL 254.324a(5) states in relevant part: "The carrying out of the Mackinac bridge authority's purposes, including a utility tunnel, are for the benefit of the people of this state and constitute a public purpose."

the conveyance of the 2018 Easement would improve, enhance, or not adversely affect public rights in the waters and bottomlands of the Straits of Mackinac which are fundamental under state and federal law.

A. A conveyance of a property interest or agreement for occupancy and use of the soils and waters of the Great Lakes by the state must conform to the requirements of the Public Trust Doctrine.

As stated at the outset, Enbridge's proposed corridor tunnel and new tunnel pipeline are subject to the State's sovereign trust title, the Public Trust Doctrine, and the GLSLA. All of these waters and the soils beneath them are held in and protected by a public trust.[14] As a general rule, there can be no disposition, transfer, conveyance, occupancy or use of any kind of these public trust waters and the soils beneath them, unless there is a statute or law that expressly authorizes the proposed disposition, occupancy, or action and the statute incorporates and requires a consideration that the following standards for the narrow exception to the rule have been duly satisfied:[15]

(1) The proposed disposition, occupancy, or action predominantly serves or enhances a public trust interest or interest (such as navigation, fishing, etc.), not a private one; and

(2) The proposed disposition, occupancy, or action will not interfere with or impair the public trust waters, soils, habitat, wildlife like fish and waterfowl, or one or more of the public-trust uses.

Both the United States Supreme Court and the Michigan Supreme Court have repeatedly held that the public trust doctrine strictly limits the circumstances under which a state may convey

MCL 254.324b(1) states in relevant part: "The creation of the Mackinac Straits corridor authority and the carrying out of the Mackinac Straits corridor authority's authorized purposes are public and essential governmental purposes for the benefit of the people of this state and for the improvement of the health, safety, welfare, comfort, and security of the people of this state."

[14] Id.; see also *Obrecht v National Gypsum*, 361 Mich 299 (1961).

[15] Id.; p. 416.

property interests in public trust resources. In *Illinois Central Railroad Co v Illinois*, 146 US 387, 455-456 (1892), the United States Supreme Court identified only two exceptions under which such a conveyance is permissible: 1) when the conveyance results in the improvement of the interest thus held; or, 2) when parcels can be disposed of without detriment to the public interest in the lands and waters remaining.

Maintaining fidelity to the Public Trust Doctrine is a "*high, solemn* and *perpetual.*…duty of the State to forever maintain." *Collins v. Gerhardt*, 211 N.W. 115, 118 (Mich. 1926).[16] The public trust doctrine and its legal mandates are irrevocable.[17]

Accordingly, in order to be a valid conveyance authorized under law, the DNR must make a determination that the easement and the lease will not be inimical to the public trust. In the absence of finding and determination that "the public trust in waters will not be impaired or substantially affected" the conveyance of the easement and tunnel lease are invalid and void as the conveyance of the easement and lease without such required findings constituted a per se violation of the PTD.[18]

B. A conveyance of a property interest or agreement for occupancy and use of the soils and waters of the Great Lakes by the state must conform to the requirements of the Great Lakes Submerged Lands Act.

As amended, the GLSLA requires that any conveyance, lease, agreement, occupancy, use or other action in the waters or on, in, through or under the bottomlands of the Great Lakes, be

[16] The Michigan Supreme Court has emphatically declared that "the public trust doctrine is alive and well in Michigan[.]" See, *Glass v Goeckel*, 473 Mich 667, 678-679 (2005), where the Michigan Supreme Court held that the state, as sovereign, is obligated to protect and preserve the waters of, and lands beneath, the Great Lakes. "The state serves, in effect, as the trustee of public rights in the Great Lakes for fishing, hunting, and boating for commerce or pleasure." Id. at 679 (emphasis added).

[17] *Illinois Central R Rd v Illinois; Obrecht v National Gypsum Co., supra* n. 14.

[18] No part of the beds of the Great Lakes can be alienated or otherwise devoted to private use in the absence of due finding that the conveyance can be done without detriment to the public interest in the lands and waters remaining. *Obrecht v. National Gypsum Co.*, 361 Mich. 399. 413; 105 N.W.2d 143 (1960).

authorized by EGLE pursuant to the public trust standards in the GLSLA and the common law of the Public Trust Doctrine. Sections 32502-32508 of the GLSLA also specifically incorporates public trust principles including the requirement that any conveyance of an interest in Great Lakes waters and bottomlands is subject to a mandatory determination the use of public trust lands and waters will not be substantially affected or that the public trust in the same will not be impaired.

Sec. 32502 provides:

> The lands covered and affected by this part are all of *the unpatented lake bottomlands and unpatented made lands in the Great Lakes*, including the bays and harbors of the Great Lakes, *belonging to the state or held in trust by it*, including those lands that have been artificially filled in. The waters covered and affected by this part are all of the waters of the Great Lakes within the boundaries of the state. *This part shall be construed so as to preserve and protect the interests of the general public in the lands and waters* described in this section, *to provide for the sale, lease, exchange, or other disposition of unpatented lands* and the private or public use of waters over patented and unpatented lands, and to permit the filling in of patented submerged lands *whenever it is determined by the department that the private or public use of those lands and waters will not substantially affect the public use of those lands and waters for hunting, fishing, swimming, pleasure boating, or navigation or that the public trust in the state will not be impaired by those agreements for use, sales, lease, or other disposition*. The word "land" or "lands" as used in this part refers to the aforesaid described unpatented lake bottomlands and unpatented made lands and patented lands in the Great Lakes and the bays and harbors of the Great Lakes lying below and lakeward of the natural ordinary high-water mark.[19]

> Sec. 32503. (1) Except as otherwise provided in this section, the department, *after finding that the public trust in the waters will not be impaired or substantially affected, may enter into agreements pertaining to* waters over and the filling in of submerged patented lands, *or to lease or deed unpatented lands, after approval of the state administrative board. Quitclaim deeds, leases, or agreements covering unpatented lands* may be issued or entered into by the department with any person, and shall contain such terms, conditions, and requirements as the department determines to be just and equitable and *in conformance with the public trust*. The *department shall reserve to the state all mineral rights, including, but not limited to, coal, oil, gas, sand, gravel, stone, and other materials or products located or found in those lands*…[20] (Emphasis Added).

[19] MCL 324.32502; see also 324.32503, 324.32504, 324.32505(4), 324.32512.

[20] MCL324.32503(1).

In the above sections, the legislature makes clear that:

1) GLSLA is to "be construed so as to preserve and protect the interests of the general public in the lands and waters;"
2) GLSLA applies to the "sale, lease, exchange, or other disposition of unpatented lands;"
3) The state must ensure that "the public trust in the state will not be impaired by those agreements for use, sales, lease, or other disposition;" and,
4) All conveyances of state lands are authorized only "after finding that the public trust in the waters will not be impaired or substantially affected" and must be "in conformance with the public trust."

To the extent that Enbridge may claim that the state's public trust interest and fiduciary responsibilities do not extend to the subterranean lands that will be excavated to accommodate the tunnel, that argument must fail. Section 32503 of GLSLA also makes clear that the GLSLA applies to subterranean lands by specific reference to materials found under subterranean lands "*including, but not limited to, coal, oil, gas, sand, gravel, stone, and other materials or products located or found in those lands."* The state's title and public trust interest in the lands subjacent to the bottomlands cannot be seriously contested. Moreover, the title to the soils in the bottomlands and waters of the Great Lakes vested absolutely and in public trust on the State's admission to the Union in 1837.[21]

III. ENBRIDGE'S ATTEMPT TO NARROW THE SCOPE OF REVIEW AND DECISION OF THE COMMISSION IS CONTRARY TO THE REQUIRED SCOPE OF REVIEW UNDER ACT 16 AND THE MICHIGAN ENVIRONMENTAL PROTECTION ACT.

Enbridge seeks to exclude from the Commission's evaluation and decision as to whether "there is a public need to replace the existing Line 5 crossing of the Straits with a pipe segment

[21] *Illinois Central R Rd, supra*; *Shively v Bowlby*, *supr*a, n. 3.

relocated in a utility tunnel beneath the Straits." This is contrary to the Commission's fundamental evaluation and determination of the "necessity" element for siting crude oil pipelines under Act 16 and the Commission's decisions and orders.[22] The Commission's authority to evaluate and investigate "public need" in plenary under MCL 483.3(1)[23]

A. The Review and Determination of Necessity of the Line 5 Tunnel and Pipeline Utility Project Require a Full and Comprehensive Review on the Need for and Alternatives.

Enbridge's motion *in limine* is an attempt to delimit the Commission's inquiry into the need, reasonability and prudence of its proposed $500 million capital expenditure[24] because market trends strongly suggest that the project presents serious financial risks for Enbridge's investors as well as consumers who will ultimately bear the cost of the project. Examination of market trends suggest the "public need" for the tunnel is in serious question.

Under 1929 PA 16, MCL 483.1 et seq., a "business of carrying or transporting, buying, selling, or dealing in crude oil or petroleum or its products" must obtain a certificate of necessity

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[22] See In re Enbridge Energy, MPSC Case No. U-17120, Pre-Filed Direct Testimony of Mark Sitek (V.P., Enbridge), Transcript, pp. 11-14; FLOW Public Comments on Dynamic Risk Draft Alternatives Analysis Report, Aug. 4, 2017, pages 6-7, see https://forloveofwater.org/wp-content/uploads/2016/04/Final-FLOW-comments-Alternatives-Analysis-8-4-17.pdf. While Enbridge testified that doubling the capacity of Line 6b would meet all of its future needs, the record does not disclose any effort by Enbridge that it had also nearly doubled its capacity by adding the anti-friction fluid devices to Line 5.

[23] Sec. 3.
(1) Subject to subsection (2), *the commission is granted the power to control, investigate,* and regulate a person doing any of the following:
(a) Exercising or claiming the right to carry or transport crude oil or petroleum, or any of the products thereof, or carbon dioxide substances, by or through pipe line or lines, for hire, compensation, or otherwise within this state.
(b) Exercising or claiming the right to engage in the business of piping, transporting, or storing crude oil or petroleum, or any of the products thereof, or carbon dioxide substances within this state.
(c) Engaging in the business of buying, selling, or dealing in crude oil or petroleum or carbon dioxide substances within this state.

[24] The estimated $500 million projected cost also needs to be examined by the Commission given that the original cost estimate was based upon a tunnel with a ten-foot diameter. Enbridge's permit application now indicates that the tunnel will have a diameter of 18-21 feet. It is logical that a tunnel four times as large as originally planned will cost considerably more than the original estimate.

from the MPSC authorizing the project. [25] The purpose of the tunnel is to extend the operable life of Line 5 for 99 years. The determination of public need must take into account demand forecasts for the transport of oil and natural gas liquids. The analysis should include an evaluation of these forecasts and trends and modeling that examines probability distributions for resource planning variables specifically including future demand curves for fossil fuels.

Given the increasingly well documented environmental, health, and climatic impacts that result from the combustion of fossil fuels, project proponents seeking certificates of necessity should be required to undertake thorough analyses that evaluate and model future demand for fossil fuel-based technologies and infrastructure, including the market, financial and regulatory risks such technologies and infrastructure may present, as well as their potential to become stranded investments.

The analyses should also include projections of electric vehicle penetration including OEM transitions to EVs, sovereign prohibitions on future internal combustion vehicle sales, tar sand disinvestment trends, and fossil fuel disinvestment trends by fund managers and insurer fossil fuel policy. Recent petroleum sector forecasts by firms specializing in energy trends like Bloomberg, Navigant, and Goldman Sachs, predict that the transition to electric vehicles will accelerate quickly with a corresponding, precipitous drop in demand for transportation fuels.[26]

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[25] Additionally, R 460.17601 under 1929 PA 16 governing new constructions of public utilities, including pipelines, provides in pertinent part: (1) An entity listed in this subrule shall file an application with the commission for the necessary authority to do the following:

> (c) A corporation, association, or person conducting oil pipeline operations within the meaning of the provisions of Act No. 16 of the Public Acts of 1929, being §483.1 et seq. of the Michigan Compiled Laws, that wants to construct facilities to transport crude oil or petroleum or any crude oil or petroleum products as a common carrier for which approval is required by statute.

[26] Reuters, *Past its peak? Battered oil demand faces threat from electric vehicles*, May 19, 2020. https://www.reuters.com/article/us-data-esg-autos/past-its-peak-battered-oil-demand-faces-threat-from-electric-vehicles-idUSKBN22V1HY

In determining whether a Certificate of Necessity should be issued for a pipeline project, the Commission's evaluation of the economic impact and risk to ratepayers is required. Determining whether a project may present a financial risk to ratepayers is a core function of the commission. The National Association of Regulatory Utility Commissioners' ("NARUC") guidance is explicit on the need to assess financial risk:

> "Rather than comparing expected return to perceived risk, utility regulators typically want to minimize rates or cost of service or both, while taking into account the degree of risk that ratepayers will face, as well as the risks to investors. Thus, there is a need to balance the expected cost of a resource, or a portfolio of resources, with the risk that the actual cost of the resource may be more or less than expected at various times over the planning horizon."[27]

The U.S. Environmental Protection Agency's guidance is in accord, indicating that public utility commissions must develop and examine key analysis factors, such as demand forecasts, commodity price forecasts, and available alternative resource options.[28]

Long-term market trends and recent events strongly suggest the need for fossil fuel-related infrastructure is decreasing significantly. Petroleum industry economists are warning that peak oil demand is near or may have already arrived. BP's (British Petroleum) chief economist recently explained why BP will undertake a fundamental restructuring of its business model to invest in zero-carbon energy sources.

> "The advent of electric vehicles and the growing pressures to decarbonise the transportation sector means that oil is facing significant competition for the first time within its core source of demand. This has led to considerable focus within the industry and amongst commentators on the prospects for peak oil demand – the recognition that the combined forces of improving efficiency and building pressure to reduce carbon

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[27] *Energy Portfolio Management: Tools & Resources for State Public Utility Commissions,* https://pubs.naruc.org/pub.cfm?id=536E43E4-2354-D714-51C4-DAD3C6A8D5B3

[28] EPA's guidance to public utility commissions, *Electricity Resource Planning and Procurement,* https://www.epa.gov/sites/production/files/2017-06/documents/gta_chapter_7.1_508.pdf

emissions and improve urban air quality is likely to cause oil demand to stop increasing after over 150 years of almost uninterrupted growth."[29]

The energy sector has lost hundreds of billions in market value and future production will be reduced as the number of active oil rigs have plummeted.[30] The Wall Street Journal reported that the oil development industry lost $280 billion between 2007 and 2018.[31] Since 2015, more than 200 North American oil and gas producers have filed for bankruptcy[32] protection, leaving $130 billion in debt. Oil and gas bankruptcies have accelerated in 2020, which now include oil giant Chesapeake Energy Corporation.[33]

Other market indicators suggest that investment in new pipeline infrastructure is highly questionable in light of clear trends indicating a precipitous drop in oil consumption in future years.

- Analysis released August 9th by world's 8th largest bank, BNP Paribas reports "that the economics of oil for gasoline and diesel vehicles versus wind-and solar-powered EVs are now in relentless and irreversible decline, with far-reaching implications for both policymakers and the oil majors."[34]
- Seventeen major tar sands projects have been cancelled in the last several years. Seven international oil companies – Exxon Mobil, Conoco Phillips, Statoil, Koch Industries, Marathon, Imperial Oil and Royal Dutch Shell – have divested their interests in Alberta

[29] BP, Peak oil demand and long-run prices, https://www.bp.com/en/global/corporate/energy-economics/spencer-dale-group-chief-economist/peak-oil-demand-and-long-run-oil-prices.html

[30] Business Insider, *The battered $700 billion US energy industry is now worth roughly half of Microsoft amid oil's record plunge, April 21, 2020.* https://markets.businessinsider.com/commodities/news/us-energy-industry-worth-half-microsoft-oil-price-crash-record-2020-4-1029113811#

[31] WSJ, *Wall Street Tells Frackers to Stop Counting Barrels, Start Making Profits*, December 13, 2017. https://www.wsj.com/articles/wall-streets-fracking-frenzy-runs-dry-as-profits-fail-to-materialize-1512577420

[32] https://www.resilience.org/stories/2019-06-10/peak-oil-review-10-june-2019/

[33] World Oil, *Chesapeake joins more than 200 other bankrupt U.S. shale producers*, June29, 2020. **https://www.worldoil.com/news/2020/6/29/chesapeake-joins-more-than-200-other-bankrupt-us-shale-producers**

[34] PNB Paribas, *Wells, Wires and Wheels,* August 2019. https://docfinder.bnpparibas-am.com/api/files/1094E5B9-2FAA-47A3-805D-EF65EAD09A7F

tar sands and will not need Enbridge's future pipeline services.[35] The conveyance of tar sand oils represents utilizes a large increment of Enbridge's ongoing carrying capacity and a major revenue source.

- The International Energy Agency (IEA) projects *Global EV Outlook 2020* that adoption of electric vehicles (EVs) will result in reduced oil demand of 2.5 – 4.2 million barrels per day by 2030.[36]
- The world's major auto manufacturers are transitioning away from gas and diesel-powered vehicles. General Motors, Ford, Toyota, VW, Volvo, and others are making clear that petroleum-free electric drivetrains will dominate their future manufacturing investments and that future product offerings will not use transportation fuels.[37]
- 18 countries, including England, France, Israel, Norway, Netherlands, Slovenia, India, Egypt, and China have announced their intention to ban future sales and, in some cases, the use of vehicles with internal combustion engines. 25 cities and metropolitan areas intend to prohibit the use of gas and diesel-powered vehicles.[38] California and Massachusetts have recently moved to prohibit the sale of gasoline and diesel-powered cars by 2035.[39]
- The purchase price of electric vehicles will be less than vehicles with internal combustion engines by 2022 reducing the demand for petroleum products.[40]

Examination of current and future demand forecasts for the transport of crude oil suggests that a large capital expenditure on pipeline-related infrastructure is imprudent and inconsistent with the Commission's responsibility to protect consumers. The future need of Enbridge's

[35] Grist, *This could be the end of Canadian tar sands*, January 12, 2017. https://grist.org/article/this-could-be-the-end-of-canadian-tar-sands/

[36] IEA, *Global EV Outlook 2020*, https://www.iea.org/reports/global-ev-outlook-2020

[37] WSJ, *Auto Makers Charge Ahead with Electric-Vehicle Plans*, July 19, 2020. https://www.wsj.com/articles/auto-makers-charge-ahead-with-electric-vehicle-plans-11595156400

[38] Center for Climate Protection, *Survey of Global Activity to Phase Out Internal Combustion Engine Vehicles*, September 2018. https://theclimatecenter.org/wp-content/uploads/2018/09/Survey-on-Global-Activities-to-Phase-Out-ICE-Vehicles-FINAL.pdf

[39] PC Magazine, Massachusetts to Ban Sale of New Gas-Powered Vehicles by 2035, January5, 2021. https://www.pcmag.com/news/massachusetts-to-ban-sale-of-new-gas-powered-vehicles-by-2035#:~:text=In%20an%20effort%20to%20achieve,state%20to%20implement%20such%20sanctions.

[40] Yale Environment 360, *Electric Cars Could Be as Affordable as Conventional Vehicles in Just Three Years*. April 18, 2019. https://e360.yale.edu/digest/electric-cars-could-be-as-affordable-as-conventional-vehicles-in-just-three-years

carrying capacity and crude oil are directly related to the question of necessity. In the proceeding on necessity before the Commission on the relocation and replacement of Line 6b, future need was expressly part of the decision and order.[41] In fact, Enbridge's Sitek testified under oath that the new replacement pipeline for Line 6b would meet the future needs of Enbridge and Michigan.[42]

Enbridge's motion must be denied, because the failure to fully consider necessity and related market demand, trends, and capacity within the existing crude oil pipeline and transport system violate Act 16, its rules, and the decisions and orders of the Commission.

B. The Commission Must Examine the Environmental, Health, and Climatic Risks of the proposed Tunnel Under the Analytical Framework of the Michigan Environmental Protection Act.

With respect to pipelines, the MPSC has specifically determined that it must identify and determine environmental impacts associated with pipeline projects.

> "Neither Act 9 nor Act 16 provide guidance relating to specific criteria for the Commission to consider in its decisions relating to pipeline applications. In 2012, the Commission issued an order in Docket No. U-17020 which stated, '…the Commission will grant an application pursuant to [Act 9 and] Act 16 when it finds that (1) the applicant has demonstrated a public need for the proposed pipeline, (2) the proposed pipeline is designed and routed in a reasonable manner, and (3) the construction of the pipeline will meet or exceed current safety and engineering standards.' *The Commission is also required by law to determine if there are environmental impacts from the proposed project and whether those can be appropriately mitigated."* (emphasis added).[43]

As the tunnel is proposed to extend the operable life of Line 5 for 99 years, the MPSC must determine and evaluate the environmental and health consequences of approving the tunnel.

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[41] See n 15, *supra*.

[42] *Id*.

[43] MPSC, Facility Siting, https://www.michigan.gov/mpsc/0,9535,7-395-93309_93606_93615---,00.html.

When gasoline and diesel fuel are burned that produce carbon dioxide a GHG, carbon monoxide, nitrogen oxides, particulate matter, and unburned hydrocarbons.[44] According to the Michigan Department of Health and Human Services, GHG emissions have already resulted in the impairment of Michigan's natural resources – effects that will get worse unless CO2 emissions are abated.[45]

Michigan has experienced measurable increases in temperature since 1951 ranging from 0.6°F in the southeastern Lower Peninsula to 1.3°F in the northwestern Lower Peninsula.[46] The Great Lakes, like the oceans, are absorbing heat, but at a faster rate, affecting limnologic health and altering ecosystems. Lake Superior's summer (July–September) surface water temperatures increased approximately 4.5°F (2.5°C) since 1980, warming twice as fast as air temperature. Great Lakes ice cover has decreased by 71% in the past 40 years.[47]

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[44] EIA, Gasoline and the Environment, https://www.eia.gov/energyexplained/gasoline/gasoline-and-the-environment.php#:~:text=Gasoline%20use%20contributes%20to%20air%20pollution&text=The%20vapors%20given%20off%20when,carbon%20dioxide%2C%20a%20greenhouse%20gas.

[45] Present and future climate impacts in Michigan according to MI Dept of Health and Human Services and National Climate Assessment:

- Increased severity and frequency of storm events,
- Water-borne diseases from flooding, sewage overflows, septic failures, and development of harmful algal blooms,
- Increased heat wave intensity and frequency, increased humidity, degraded air quality, and reduced water quality will increase public health risks,
- Increased heat stress causing ecosystem disturbance, crop failures and reduced yields,
- More frequent flooding with associated soil erosion, declining water quality and beach health,
- More numerous late spring freezes detrimental to fruit crops,
- Increased aquatic invasive species and harmful blooms of algae, and declining beach health,
- Negative impacts on transportation, agriculture, human health, and infrastructure.

MDHHS, Michigan Climate and Health Profile, 2015.
https://www.michigan.gov/documents/mdhhs/MI_Climate_and_Health_Profile_517517_7.pdf.

[46] International Association for Great Lakes Research, The Great Lakes at a Crossroads Preparing for a Changing Climate, http://iaglr.org/scipolicy/factsheets/iaglr_crossroads_climatechange.pdf.

[47] http://absolutemichigan.com/michigan/great-lakes-ice-coverage-down-71-in-past-40-years/

The overwhelming scientific consensus holds that these unavoidable byproducts of petroleum combustion have profound environmental, climactic, and public health consequences that are quantifiable and monetizable. Line 5 transports approximately 540,000 barrels of crude oil and natural gas liquids per year (22.68 million gallons per day).[48] The annual emissions attributable to the oil and natural gas liquids exceed 57 million metric tons, a loading of atmospheric carbon that is greater than the annual yield from the combined operation on the nation's three largest coal plants.[49]

While the Commission has not sought to quantify the carbon emissions of pipeline projects in the past, doing so now is a scientific, environmental, and economic imperative. "The public trust doctrine, like all common law principles, should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit."[50] The Commission cannot make a determination of necessity or prudency without taking account of the long-term consequences of projects that have, or are likely to have, the effect of impairing the environment or public health.

Accordingly, the Commission is required within its scope of authority under Ac 16 by law to consider certain state and federal laws and regulations, including the Michigan Environmental

[48] https://www.michigan.gov/line5/0,9833,7-413-99504---,00.html

[49] The carbon emissions of top 3 coal plants in United States (metric tons)

James H. Miller	20,965,151
Monroe Power Plant	16,599,356
Colstrip Steam Electric Station	15,617,378
TOTAL	53,181,885

[50] *Borough of Neptune City v. Borough of Avon-By-The-Sea*, 294 A.2d 47, 54 (N.J. 1972).

Protection Act (MEPA), which imposes separate substantive legal requirements upon the MPSC. If the 1953 easement is void, then necessarily the scope of the Tunnel Project extends to the new 2018 easement, assignment, and 99-year lease and the entire Line 5. However, as discussed below, whether or not the 1953 easement is revoked or void or not does not affect the scope of review and decision on the evidence required by the MEPA.

IV. NOTIFICATION OF REVOCATION OF THE 1953 EASEMENT DOES NOT AFFECT THE COMPREHENSIVE SCOPE OF EVIDENCE LEGALLY NECESSARY FOR THE COMMISSION TO REVIEW AND DETERMINE THE ENBRIDGE APPLICATION UNDER ACT 16 AND THE BINDING LEGAL PRECEDENT UNDER THE MICHIGAN ENVIRONMENTAL PROTECTION ACT.

Michigan courts have consistently recognized that MEPA imposes additional environmental review requirements that are supplemental to existing administrative and statutory requirements. The MEPA itself expressly provides that "[t]his part is supplementary to existing administrative and regulatory procedures provided by law.[51] The Michigan Supreme Court held that. "It is most important to note that [M]EPA does not, as both parties imply, merely provide a separate procedural route for protection of environmental quality, it also is a source of supplementary substantive environmental law." *State Highway Commission v Vanderkloot*, 392 Mich 159 (1974). Interpreting MEPA, the Court in Vanderkloot found that the statute with its substantive duties and procedural requirements is designed to accomplish two distinct results:

(a) to provide a *procedural* cause of action for protection of Michigan's natural resources; and

(b) to prescribe the *substantive* environmental rights, duties, and functions of subject entities (court's emphasis).

MEPA requires a state agency or commission to undertake a two-part inquiry:

[51] MCL 324.1706.

1) determine whether the project proponent has demonstrated that *"there is no feasible and prudent alternative to* [the polluting, impairing, or destroying entity's] *conduct"; and*

2) whether *"such conduct is consistent with the promotion of the public health, safety and welfare in light of the state's paramount concern for the protection of its natural resources from pollution, impairment or destruction"* (court's emphasis).

The *Vanderkloot* court found that even though the statute at issue - the Highway Condemnation Act - had no provisions requiring environmental review, the failure of the State Highway Commission *in a necessity determination* to apply MEPA and examine the likely effects and feasible and prudent alternatives to a highway project involves environmental "pollution, impairment [or] destruction" would constitute an abuse of discretion and result in an invalidation of the determination.

> "We additionally hold that the substantive environmental duties placed on the State Highway Commission by the Environmental Protection Act of 1970, MCLA 691.1201 *et seq.;* MSA 14.528(201) *et seq.,* are relevant to [the Highway Condemnation Act] judicial review in that failure by the Commission to reasonably comply with those duties may be the basis for a finding of fraud or abuse of discretion."[52]

In accord is *Ray v Mason County Drain Commissioner,* 393 Mich 294 (1975). There, the court held that MEPA "does more than give standing to the public and grant equitable powers to the circuit courts, it also imposes a duty on individuals and organizations both in the public and private sectors to prevent or minimize degradation of the environment which is caused or is likely to be caused by their activities…. [MEPA] allows the courts to fashion standards in the context of actual problems as they arise in individual cases and to *take into consideration changes in*

[52] *Vanderkloot,* 392 Mich at 189-190.

technology which the Legislature at the time of the Act's passage could not hope to foresee." 393 Mich at 307[53] (emphasis added).[54] In addition, the Court noted that:

> "Relevant to such a review, for example, is the Commission's duty to consider alternative routes for environmental purposes. This duty is imposed by EPA (referring to MEPA).[55]
>
> * * *
>
> "Early consideration of the environmental impact of proposed highway condemnation decisions should also better serve the affected community's ecological interests while sparing highway planners unexpected public opposition at a point in time when planning has reached a stage too far advanced for inexpensive and uncomplicated alteration. Note the following analysis on this point:
>
> '. . . highway engineers . . . have generally considered it unprofessional to scratch around in parochial politics. Because engineers have tended to ignore the highway's impact on communities it penetrates, they have frequently been subjected to what Marvin Manheim of MIT calls 'the big surprise.' They study the highway location, run benefit-cost analyses, propose a route publically [sic], and then are surprised by the overwhelming community opposition it creates.' Demaree, 'Cars and Cities on a Collision Course, 'Fortune (February 1970), p. 188.
> Adding to this 'big surprise' problem is a growing public awareness that ecological considerations are just as important to the public interest as the benefits of improved public services resulting from new construction. Recently in Michigan this same public awareness has focused on the environmental impact of public utilities construction… 'MONITORING MICHIGAN'S UTILITIES'… MICHIGAN'S need for adequate supplies of electricity and gas at reasonable prices and without despoiling the state are eventually going to make imperative the controls on utility plant siting and monitoring of management decisions recommended by Gov. Milliken…. [56]

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[53] Speaking to whether MEPA is in *pari materia* with the Oil Conservation Act, the court stated:

> "Having concluded that 1939 PA 61 and 1921 PA 17 provide statutory authority for denial of the drilling permit in the instant case, it is unnecessary to decide whether the Michigan environmental protection act, MCL 691.1201 *et seq.;* MSA 14.528(201) *et seq.,* must be read *in pari materia* with the oil conservation act. Nevertheless, if an answer to this question were required, we would hold that the Michigan environmental protection act should be read *in pari materia* with all legislation relating to natural resources."

[54] In accord, Her Majesty the Queen v Detroit, 874 F2d 332 (1989), a case challenging the siting of the Detroit municipal incinerator, the Sixth Circuit followed Ray, finding that, "In addition to creating procedural rights, MEPA imposes a substantial duty on all persons and entities, public and private, to prevent or minimize environmental degradation caused by their activities.").

[55] Footnote 7, 392 Mich at 194.

[56] Id., footnote 10.5.

More recently, in *Buggs v Michigan Public Service Commission*, COA No. 315058, (2015) (unpublished opinion), a case involving construction of a proposed natural gas pipeline, the court found that MEPA "established a substantive standard prohibiting the impairment of natural resources, which applies to an agency's determinations." Following *Vanderkloot*, the court held that the MPSC "had to consider whether the proposed project would impair the environment, whether there was a feasible and prudent alternative to the impairment, and whether the impairment was consistent with the promotion of the public health, safety, and welfare in light of the state's paramount concern for the protection of its natural resources from pollution, impairment, or destruction."

The *Buggs* court stated that "although the Commission found in a cursory manner that the pipelines would serve the public convenience and necessity, it did not otherwise *expressly speak to necessity, practicability, feasibility, or prudence in its orders.*" Remanding the case back to the MPSC, the court stated that the Commission "failed to follow the *independent statutory requirement* imposed under MEPA. Because its orders approving the pipelines were unlawfully issued, we vacate those orders and remand for a new necessity determination in both dockets." (emphasis added). See also, *Mich Oil v. Natural Resources Commission*, 406 Mich 1, 32-33 (Mich 1979). ("The environmental protection act, by its terms, is substantively supplementary to existing laws and administrative and regulatory procedures provided by law."); *West Michigan Environmental Action Council v Natural Resources Commission*, 405 Mich 741 (1979), (under MEPA, courts have a responsibility to independently adjudicate and determine whether there is adequate protection from pollution, impairment and destruction).

Buggs holds that the Commission must examine the "necessity, practicability, feasibility, and prudence" of projects. Although the Commission in the past has not evaluated health and

environmental externalities when considering projects and regulatory approvals, the legal requirement to do so has applied to the Commission since *Vanderkloot* and *Ray*. Unfortunately, when Enbridge requested approval from the Commission in replacing all of ruptured Line 6b after the Kalamazoo disaster, the necessity, prudence, likely effects, and alternatives to the new Line 6b (now Line 78) were not considered. Had that occurred, the Commission may well have determined, based on Enbridge's testimony that the new Line 78 would meet all of its future needs,[57] that Line 5, including the existing dangerous dual pipelines in the Straits of Mackinac, were not necessary; this was because the new Line 78 has a design capacity of 800,000 bbl./day, an excess of 400,000 bbl./day, a sufficient volume in light of today's circumstances with declining crude oil demand and climate change impacts.

As for the scope of evidence in this case, in light of the Commission's remand, the Commission has a legal duty to consider and/or determine likely effects and alternatives, and the failure to do so on a necessity determination for the new or extended 99-year tunnel and pipeline constitutes an abuse of discretion. This duty and the scope of consideration under MEPA are not changed by the revocation of the existing 1953 dual pipelines easement in the Straits of Mackinac. Whether it exists or not, the scope of the tunnel's proceeding must be equivalent to the scope of review required by MEPA.

Moreover, when it comes to necessity and alternatives under MEPA and Act 16, more and more state and federal regulatory bodies are now examining the amount of carbon emissions associated with projects and the economics of a declining crude oil markets. Public service commissions in ten states already evaluate the health, environmental and climate impacts of new

[57] In re Enbridge Energy Application to MPSC, U-17020, Testimony of Thomas Hodge, Project Director, Line 6b Replacement, pp. 18-19.

electric generation resources in the IRP process[58] and federal agencies that review major projects such as pipeline proposals must take a "hard look" at the environmental consequences of the proposed action including carbon emissions in applying the National Environmental Policy Act (NEPA).[59]

In *Sierra Club v FERC*, 867 F3d 1357 (DC Cir 2017), the D.C. Circuit held that "FERC must either quantify and consider the project's downstream carbon emissions or explain in more detail why it cannot do so." The court found that NEPA requires FERC to balance "the public benefits against the adverse effects" of natural gas pipelines and evaluate the reasonably foreseeable downstream emissions and climate impacts resulting from its approval of expanded natural gas pipeline infrastructure.

In accord, is *Birckhead v FERC*, No. 18-1218 (DC Cir 2019), the court followed *Sierra Club v FERC*, stating that FERC has the responsibility to attempt to obtain information necessary to evaluate the downstream environmental effects of a proposed interstate pipeline project.[60] Similarly, in *Wild Earth Guardians v Zinke*, 368 F Supp 3d 41, (DDC 2019), the court held that the Bureau of Land Management did not sufficiently consider climate change when leasing federal lands for oil and gas development.

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[58] California, Colorado, Illinois, Maine, Maryland, Minnesota, Nevada, New Jersey, New York, and Washington. https://policyintegrity.org/files/publications/Valuing_Climate_Impacts.pdf.

[59] *See* FERC, *Certification of New Interstate Natural Gas Facilities*, 163 FERC ¶ 61,042, 2018. (NEPA and its implementing regulations require that review of major projects such as pipeline proposals demand a "hard look" at the environmental consequences of the proposed action and identification of possible alternatives).

[60] FERC's reviews should "ensure that pipeline infrastructure additions occur only if they: are required by the public interest after considering all relevant factors; produce greater benefits than costs (including through consideration of environmental externalities); do not impose undue burdens on landowners and communities; and enable the orderly development of infrastructure." Testimony of Susan F. Tierney, before the U.S. House Subcommittee on Energy of the Committee on Energy and Commerce Subcommittee Hearing on "Modernizing the Natural Gas Act to Ensure It Works for Everyone" February 5, 2020. https://docs.house.gov/meetings/IF/IF03/20200205/110468/HHRG-116-IF03-Wstate-TierneyS-20200205.pdf

In summary, both state and federal appellate courts have held that state agencies and commissions must apply an independent and supplementary analytical review to determine whether a project that has, or is likely to have, the effect of polluting, impairing or destroying the air, water, or other natural resources, or the public trust in those water and natural resources.

MEPA requires an evaluation of feasible and prudent alternatives, including a "no action" alternative. This, in turn, requires an analysis of "feasible and prudent alternatives" when considering pipeline projects that have, or are likely to have, detrimental effects on public health and the environment. Evaluating feasible and prudent alternatives is complementary to the determination of public need. Both ask the question, "Is there an alternative that results in more public benefit or less potential public harm?

The Commission should require Enbridge to provide the means of obtaining an independent third-party review tasked with evaluating alternatives to the tunnel that would examine the following:

- Whether the carrying capacity of the existing network of North American pipelines is sufficient to meet future needs?
- To what extent did the 2010 catastrophic failure of Line 6b and the more recent temporary partial closure of Line 5 result in constriction of supply, market disruption, or price increases to end users?
- Does Line 6b, now reconstructed as Line 78, have the capacity to meet market demand if Line 5 closes?
- Whether cessation of Line 5 would result in a new pipeline system equilibrium capable of meeting existing and future demand for oil and natural gas liquids?
- What is the potential for the tunnel project to become a stranded asset and liability to the State of Michigan in the event market trends play out as predicted?

In 2019, the Energy Information Agency released an inventory of new constructed or expansion of existing pipelines.[61] The inventory listed 230 new or expanded pipeline projects with 21 projects attributed to Enbridge. The Commission should consider whether these new or expanded pipelines are capable of meeting future market demand.

Given the strong market trends favoring the transition to zero carbon energy generation resources and the abundant and growing evidence of the environmental, economic, and public health impacts associated with the development and combustion of fossil fuels, the Commission must require Enbridge to provide sufficient analytical data and information in order to make an informed determination on whether a Certificate of Necessity should issue.

V. CONCLUSION AND REQUESTED ACTION

First, the Commission should dismiss or hold in abeyance this proceeding because Enbridge does not have a legally cognizable interest in or right to use the public trust bottomlands where the proposed project is to be undertaken. The application in this case is premature, and should not be fully reviewed unless and until Enbridge obtains the required easement and 99-year lease interest under public trust law and the GLSLA.

Second, should the Commission proceed, then, alternatively, the Commission has the authority and substantive legal duty to fully evaluate the Enbridge Tunnel Project and determine the "necessity, practicability, feasibility, or prudence" of a project in its orders" and "take into consideration changes in technology" which the Legislature at the time of the Act's passage could not hope to foresee," and take into account the effects and alternatives on these matters related to the inseparability of the State's commitment to Line 5 in its entirety for 99 years.

[61] The Energy Information Administration's new pipeline database lists 230 new pipeline projects and expansions that are underway. https://www.eia.gov/petroleum/xls/EIA_LiqPipProject.xlsx.

Third, in addition to Act 16, the Commission must comprehensively consider likely effects on the environment, the Great Lakes, and other interests, and the feasible and prudent alternatives to the Tunnel Project required by the *MEPA*, *Vanderkloot*, *Ray*, and *Bugs*, *supra*. This includes the Commission's direction that the project applicants must evaluate future market, financial and regulatory trends to demonstrate that projects are necessary and prudent in light of environmental, climactic and public health concerns, and the energy transition that is underway, and that there is no feasible and prudent alternative, including the "no-build" alternative. Failure of Enbridge to address these required evaluations and/or the failure of a full consideration of likely effects and/or feasible and prudent alternatives to the new and/or extended 99-year tunnel and tunnel pipeline would constitute an abuse of discretion contrary to *Vanderkloot*, *Ray*, and *Buggs*, and would be contrary to law under Section 1705(2) of the MEPA.

The foregoing conclusion, necessarily, are not affected by the State's Notification of Revocation of the 1953 easement and decommissioning of the Line 5 dual pipelines in the Straits.

INTERVENOR FOR LOVE OF WATER (FLOW)

Date: January 15, 2021

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By: _____

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STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the Application of Enbridge Energy, Limited Partnership for the Authority to Replace and Relocate the Segment of Line 5 Crossing the Straits of Mackinac into a Tunnel Beneath the Straits of Mackinac, if Approval is Required Pursuant to 1929 PA 16; MCL 483.1 et seq. and Rule 447 of the Michigan Public Service Commission's Rules of Practice and Procedure, R 792.10447, or the Grant of other Appropriate Relief	U-20763 ALJ Dennis Mack

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PROOF OF SERVICE

On the date below, an electronic copy of the **Initial Brief of Intervenor For Love of Water (FLOW) on Remand Regarding the Motion in Limine by Enbridge Energy, Limited Partnership** were served on the following:

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The statements above are true to the best of my knowledge, information and belief.

Counsel for FLOW

Date: January 15, 2021

By: Karla L Gerds Digitally signed by Karla Gerds Date: 2021.01.15 16:47:50 -05'00'

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